

On an appeal being lodged against his decision the learned judge wrote his grounds of judgment in which he has dealt with the question with his usual thoroughness. It would appear from his reasoning that had the matter been fully argued before him he might perhaps have decided differently. He begins by saying that although 0.40 r. 11 of our Rules is not marked with an asterisk there is no identical or substantially similar rule in the English Rules of the Supreme Court, notwithstanding what is said in note 1 to our Rules. He then cites the following passage under the heading "Interest on Costs" in the *Annual Practice* 1959 at page 1859:

"Under the Judgments Act, 1838 (1 & 2 Vict. c. 110), ss. 17, 18 interest is recoverable on costs which one party is ordered to pay to another in the Ch.D. and Q.B.D. and in lunacy, but not on costs directed to be raised out of an estate."

He next refers to the passage in *Halsbury's Laws of England*, 3rd edition, Vol. 22, at page 782, paragraph 1662 to the effect that every judgment debt, including orders for costs, carries interest. Lastly, after saying that this apparently has been so since the coming into force of the English Judgments Act, 1838 and setting out the provisions of sections 17 and 18 of that Act, he goes on to say that in *Taylor v. Roe*⁽¹⁾ it was held that interest was payable on costs directed to be paid on an interlocutory order.

We now come to the final paragraph in his grounds of judgment in which he says:

"It may thus be argued that just as 'judgment debt' in the said section 17 has been interpreted to include costs so could 'judgment for the payment of money' in our said r. 11(2) be interpreted to include costs for the purpose of charging interest thereon. This line of argument, however, was not taken when the matter came up before me and my decision was then based on my view that on reading the said r. 11 as a whole 'judgment for the payment of money' in the said r. 11(2) is confined only to a judgment for the payment of debts or damages mentioned in the said r. 11(1). Had it been intended to include costs I expected the word 'costs' to have been included therein."

The view which we took of the matter was that upon a true construction of 0.40 r. 11(2) interest is payable where an order directs payment of costs to be taxed. It is to be observed that 0.40 r. 11(2) speaks of "every judgment for the payment of money". The word "judgment" is defined in section 2 of the Debtors Ordinance, 1957 to include "any decree, order or decision for the payment of money". Where there is an order for costs, it is enough if the amount of the costs is ascertained on the successful party's bill of costs being taxed by a proper officer of the court, as after taxation a further order for the payment is not necessary. Indeed, an order for payment of costs is tantamount to an order for the payment of such amount of money as may be ascertained on taxation to be the amount of the costs to which the successful party is entitled. To a very large extent, it is similar to a judgment for damages to be assessed. A judgment for damages to be assessed, or for costs to be taxed, carries interest from the date of entry of judgment and not from the date of assessment or taxation (see *Halsbury's Laws of England*, 3rd edition, Vol. 22, page 782, paragraph 1662).

For the reasons stated, we allowed this appeal but made no order as to costs. This meant that it would be open to the judgment creditor to enforce payment of the amount due as interest on costs, if he so wished.

Appeal allowed.

Solicitors: *Wrigglesworth & Co.*

RATNA AMMAL v. TAN CHOW SOO

[F.C. (Ong C.J. (Malaya), Gill F.J. & Raja Azlan Shah J.)

February 27, 1971]

[Penang — Federal Court Civil Appeal No. 56 of 1970]

Bankruptcy — Partnership — Co-partner creditor — When counterclaim, set-off, cross-demand by debtor applicable — Bankruptcy Act, 1967, s. 3(1) (i).

This was an appeal from an order of Ong Hock Sim J., dismissing an application by the appellant debtor, that the bankruptcy notice dated February 21, 1970, issued against her at the instance of the respondent as her creditor, be set aside. The bankruptcy notice was in respect of a final judgment against the debtor in the sum of \$20,694.02, being the amount of taxed costs awarded to the creditor by the Privy Council.

The debtor's application was made on the ground that she had a counterclaim and/or set-off and/or cross-demand against the creditor for an amount over and above the said sum of \$20,694.02. The basis of her claim was that the creditor was a co-partner with her of a firm to which the alleged sum of money was owing.

The question to be determined was whether or not these claims provided a counterclaim, set-off or cross-demand which equalled or exceeded the amount of the judgment debt.

Held, dismissing the appeal: (1) any counterclaim, set-off, or cross-demand set up by a debtor against the creditor must be in a liquidated sum or a money demand which is ascertainable with certainty as between the same parties and in the same right, as in ordinary actions;

(2) the debtor claimed against the creditor as a co-partner, so that any money due from the creditor could be recovered only in proceedings for the taking of accounts in accordance with the provisions relating to partnership;

(3) therefore, without such accounts being taken under a proper order of court, it would be impossible to quantify the debtor's claim against the creditor.

Cases referred to:-

- (1) *Re A Debtor, Ex parte The Debtor v. Wiseburgh* [1957] 2 All E.R. 551 at p. 562; [1957] 3 W.L.R. 184.
- (2) *In re A Bankruptcy Notice* [1934] Ch. 431.
- (3) *Hood Barrs v. Cathcart* [1895] 1 Q.B. 873.
- (4) *In re G.E.B., a Debtor* [1903] 2 K.B. 340.
- (5) *Green v. Hertzog & Ors.* [1954] 1 W.L.R. 1309.

FEDERAL COURT.

R. K. Sharma for the appellant.

C. O. Lim for the respondent.

In the High Court *Ong Huck Lim* and *R. K. Sharma* appeared for the judgment debtor, *C. O. Lim* for the judgment creditor. The following judgment was delivered on June 4, 1970:

Ong Hock Sim J.: A bankruptcy notice dated the 21st day of February, 1970 was issued by the respon-

dent against the appellant in respect of a judgment debt totalling \$20,694.02 being the amount of costs taxed and allowed as ordered by a final judgment obtained by him in the Judicial Committee of the Privy Council, whereon execution has not been stayed.

The appellant applied to set aside the bankruptcy notice on the ground that she has a counterclaim and/or set-off and/or cross-demand against the judgment creditor, the respondent herein, for an amount over and above the sum of \$20,694.02. In her affidavit sworn to on the 8th day of April, she sets out in paragraph 2 thereof the basis for her claim which is: (a) that the respondent, as a partner of a firm called the Maha Syndicate (hereinafter referred to as "the said partnership") is liable for one-half of the losses of the said syndicate and the appellant and her son for the other half which, according to the balance sheet drawn up on 31st March, 1963 was \$34,660.20 owing by the respondent to the said partnership; (b) that the respondent also obtained loans totalling \$21,500 from the said partnership which are still outstanding; (c) that the respondent is indebted to the said partnership for a further sum exceeding \$50,000 which, it is alleged, he has appropriated or misappropriated to his own use; (d) that the respondent is indebted to the said partnership in the sum of \$112,767.72 as on 31st March, 1963 for goods supplied; (e) that the respondent is also liable for the sum of \$36,044.90 in respect of his share of the losses incurred by the Ipoh branch of the said partnership. These claims were the subject matter of an action filed in Penang High Court being Civil Suit No. 123 of 1963 filed by appellant and her son, one Mahalingam Ratnavale, against the respondent.

At the hearing of the motion, counsel for the appellant referred to the case of *Re A Debtor, Ex parte The Debtor v. Wiseburgh*,⁽¹⁾ as to what constitutes a cross-demand, set-off or counterclaim.

In reply the respondent's counsel stated that Civil Suit No. 123 of 1963 has not been pursued and has not been set down for trial as the pleadings were still incomplete. The amount of the claim, even if successful, cannot be quantified. The case of *In re A Bankruptcy Notice*,⁽²⁾ was cited and the affidavit of the respondent was read.

I dismissed the application to set aside the bankruptcy notice as I held that the contention of the appellant that she has a cross-demand, set-off or counterclaim against the respondent exceeding the sum of \$20,694.02 failed in that it was not one which is enforceable by her in her own right against the respondent and which further was indeterminate and uncertain. As was said by Roxburgh J. in *Re A Debtor*,⁽¹⁾ "In my opinion, however, a demand must be more than *bona fide*; the court must be satisfied that it has a reasonable probability of success."

Here there are several claims by the said partnership against the respondent as a partner, which claims were strenuously denied by the respondent in his affidavit, which, at the same time, made reference to other differences between him and the said partnership. As I have said, the matters averred to by the appellant in

A her affidavit as a ground for setting aside the bankruptcy notice are not due in her own right. Maugham L.J. in the case *In re Bankruptcy Notice*,⁽²⁾ at p. 441 says:

"Another thing which, in my opinion, is clear is, that the words 'counterclaim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt' are words which refer to a counterclaim, set-off, or cross-demand against the creditor; ... With regard to the words, 'which equals or exceeds the amount of the judgment debt,' I agree with Romer L.J. that that must mean or refer to a claim against the creditor, either for money, or, at any rate, for money or property of value which equals or exceeds the amount of the judgment debt. ... If we are considering the word 'cross-demand' in the present case, it has to be a cross-demand against the creditor effective at the time of the hearing of the application to set aside the bankruptcy notice, either for an amount equal to or exceeding the amount of the judgment debt or, at any rate, for property of the value which at that moment exceeds the amount of the judgment debt. If that construction is correct, I think it only requires a consideration of the statement of claim in the Chancery action, the nature of which has been stated by the Master of the Rolls, to arrive at the conclusion that the debtor cannot bring his cross-demand within the definition. As already pointed out, there is property in the hands of the third parties in the Chancery action to which they are partially entitled as trustees, and it has not been shown that at the present date the debtor has money or property in the hands of the creditor which amounts to or is in value equal to the amount of the judgment debt."

The appellant's claims (in Civil Suit No. 123 of 1963) against the respondent were instituted by the respondent and her said son as partners of the said partnership against the respondent as a co-partner. This, for the reasons stated above, do not constitute in my view a counterclaim, set-off or cross-demand within the meaning of rule 94(1)(b) of the Bankruptcy Rules, 1969 and I therefore dismiss the application with costs on the higher scale.

F *The debtor appealed to the Federal Court.*

Gill F.J. (delivering the judgment of the court): This was an appeal from an order of Ong Hock Sim J. dismissing an application by the debtor that the bankruptcy notice dated 21st February, 1970 issued against her at the instance of the respondent as her creditor be set aside. We dismissed the appeal and now state the reasons.

H The bankruptcy notice was in respect of a final judgment against the debtor in the sum of \$20,694.02 being the amount of taxed costs awarded to the creditor in an appeal by the debtor to His Majesty the Yang di-Pertuan Agong which was referred for advice to the Judicial Committee of the Privy Council in London. The notice required the debtor to pay the said sum within seven days after service and contained, as the rules demand that it shall contain, the statement:

"... or you must secure or compound for the said sum to his satisfaction or the satisfaction of the court; or you must satisfy the court that you have a counterclaim, set-off, or cross-demand against the said Tan Chow Soo which equals or exceeds the sum claimed by him, and which you could not set up in the action in which the judgment was obtained."

I The debtor's application to set aside the bankruptcy notice was made on the ground that she had a counterclaim and/or set-off and/or cross-demand against the creditor for an amount over and above the said sum of \$20,694.02. The basis of her claim as set

out in paragraph 2 of her affidavit sworn to on 8th April, 1970 was:

- (a) that the creditor, as a partner of a firm called the Maha Syndicate (hereinafter referred to as "the said partnership") is liable for one-half of the losses of the said syndicate and the debtor and her son for the other half which, according to the balance sheet drawn up on 31st March, 1963 was \$34,660.20 owing by the creditor to the said partnership;
- (b) that the creditor also obtained loans totalling \$21,500 from the said partnership which are still outstanding;
- (c) that the creditor is indebted to the said partnership for a further sum exceeding \$50,000 which, it is alleged, he has appropriated or misappropriated to his own use;
- (d) that the creditor is indebted to the said partnership in the sum of \$112,767.72 as on 31st March, 1963 for goods supplied;
- (e) that the creditor is also liable for the sum of \$36,044.90 in respect of his share of the losses incurred by the Ipoh branch of the said partnership.

These claims were the subject matter of an action in the High Court at Penang, being Civil Suit No. 123 of 1963, filed by the debtor and her son, one Mahalingam Ratnavale, against the creditor.

The question which we had to decide was whether or not these claims provided a counterclaim, set-off or cross-demand which equalled or exceeded the amount of the judgment debt. As to what claims are included in the words "counterclaim, set-off or cross-demand", Lord Hanworth M.R. in *In re A Bankruptcy Notice*⁽²⁾ said:

"With regard to the word 'set-off', that is a word well known and established in its meaning; it is something which provides a defence because the nature and quality of the sum so relied upon are such that it is a sum which is proper to be dealt with as diminishing the claim which is made, and against which the sum so demanded can be set off. With regard to a counterclaim, that is a creature of the Supreme Court of Judicature Act, 1873. By section 24, sub-section 3, it was provided that the courts should have the power to hear a counterclaim, a matter which could not until that time have been included in the same action. Under that sub-section the defendant is enabled to set up by way of counterclaim a claim which he might have had against the plaintiff, and that is to be heard in the action started by the plaintiff against him, and rules are provided for that purpose. That sub-section is now section 39 of the Supreme Court of Judicature (Consolidation) Act, 1925, the Act which consolidates all the Supreme Court of Judicature Acts."

"...If a cross-demand is only to be interpreted as meaning something which could have been introduced into the action by way of counterclaim, it adds nothing to the word 'counterclaim'. 'Cross-demand' seems to me to be a word introduced in order to give a wider ambit to the meaning of these claims, something that would not be described, certainly, as a set-off, something that could not have been brought in the action, something that still lies outside a counterclaim, but is of a nature which can be specified and which is of such a nature that it equals or exceeds the amount of the judgment debt."

As Mathew J. said in *Hood Barrs v. Cathcart*,⁽³⁾ a counterclaim is equivalent to a cross-action, and is instituted as a cross-action; there is the closest analogy between raising a counterclaim and instituting an action. *Halsbury's Laws of England*, 3rd edition, Vol. 34, paragraphs 669, 670 and 671 at page 395 says:

"When A has a claim for a sum of money against B and B has a cross-claim for a sum of money against A, such that B is to the extent of his cross-claim entitled to be absolved from payment of A's claim, and to plead his cross-claim as a defence to an action by A for the enforcement of

A his claim, then B is said to have to the extent of his cross-claim a right of set-off against A.

When A has a claim of any kind against B and brings an action to enforce such claim, and B has a cross-claim of any kind against A which by law he is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim.

B Set-off is distinguishable from counterclaim both in its application and in its effect. In its application set-off is limited to money claims, whereas counterclaim is not so limited. Any claim in respect of which the defendant could bring an independent action against the plaintiff can be enforced by counterclaim subject only to the limitation that it must be such as can conveniently be tried with the plaintiff's claim. Thus not only claims for money, but also other claims such as a claim for an injunction or for specific performance or for a declaration may be the subject of a counterclaim."

C It is to be observed that section 3(1)(i) of our Bankruptcy Act, 1967, which is similar to section 1(1)(g) of the English Bankruptcy Act, 1914, requires the debtor to satisfy the court that he has a counterclaim, set-off or cross-demand. It was decided by the Court of Appeal in England in *In re G.E.B., a Debtor*⁽⁴⁾ that the section means a counterclaim, set-off, or cross-demand which is effective at the time of the hearing of the application to set aside the bankruptcy notice. That case was cited with approval in *In re A Bankruptcy Notice*⁽²⁾ in which the facts were as follows. In a pending action in the Chancery Division a debtor claimed a declaration that he was entitled to a charge on the proceeds of certain property in the hands of trustees in priority to the creditor. In a subsequent action in the King's Bench Division brought by the creditor against the debtor in respect of a different transaction the creditor obtained judgment in respect of which he issued a bankruptcy notice. On an application by the debtor under section 1(1)(g), of the Bankruptcy Act, 1914, to have the bankruptcy notice set aside, it was held that the claim in the Chancery action was not a "counterclaim, set-off or cross-demand" within the meaning of the sub-section, and was not therefore a ground for setting aside the bankruptcy notice. Lord Hanworth M.R. said in that case (at page 438):

G "The debtor's claim in the Chancery action does not appear to be in the nature of a counterclaim. It is certainly not a claim which can be at the moment so definitely quantified as to be described as necessarily equalling or exceeding the amount of the judgment debt. It is a claim which may inure to the benefit of the plaintiff, and he may be able ultimately to receive a sum, but, so far as the position can be taken at the present time, it is difficult to say that it equals or exceeds the amount of the judgment debt."

H At the hearing of the application in the lower court and before us, counsel for the debtor relied on the case of *Re A Debtor*,⁽¹⁾ the facts of which were as follows. In proceedings brought under section 17 of the Married Women's Property Act, 1882, and pending in the Divorce Division, a debtor claimed against his wife the whole of the contents of the matrimonial home and certain jewellery which he estimated to be worth in the aggregate £20,000. The wife resisted the debtor's claim and estimated the value of the chattels at £6,000. Subsequent to the institution of these proceedings the wife obtained judgment against the debtor in other proceedings for £636 15s. 4d. in respect of

which she issued a bankruptcy notice. On an application by the debtor under section 1(1)(g) of the Bankruptcy Act, 1914, to have the bankruptcy notice set aside, it was held (Jenkins L.J. dissenting), that a claim under section 17 of the Married Women's Property Act, 1882, was capable of being a "cross-demand" within the meaning of paragraph (g); that, in the circumstances, the court should be satisfied that the debtor had a cross-demand which equalled or exceeded the amount of the judgment debt; and that, accordingly, the bankruptcy notice ought to be set aside. Roxburgh J. in the course of his judgment said that, for the purpose of satisfying section 1(1)(g) of the Bankruptcy Act, 1914, not every demand will suffice. The debtor must satisfy the court that he has a genuine demand, and further, that it has a reasonable probability of success.

We did not think that that case bears comparison with the case now under consideration. In our view, any counterclaim, set-off, or cross-demand set up by a debtor against the creditor must be in a liquidated sum or a money demand which is ascertainable with certainty as between the same parties and in the same right, as in ordinary actions. As pointed out by the creditor's counsel in the court below, Civil Suit No. 123 of 1963 had not been pursued and had not been set down for trial as the pleadings were still incomplete. Moreover, the debtor's claims in that civil suit were made by her and her son as partners against the creditor as a co-partner, so that any money due from the creditor could be recovered only in proceedings for the taking of accounts in accordance with the provisions relating to partnerships: see *Green v. Hertzog & Others*.⁽⁵⁾ Without such accounts being taken under a proper order of court, it would be impossible to quantify the debtor's claims against the creditor. For the purposes of this appeal that was a sufficient answer.

The learned judge in the court below in stating his reasons for dismissing the debtor's application said in the course of his judgment:

"I dismissed the application to set aside the Bankruptcy Notice as I hold that the contention of the appellant that she has a cross-demand, set-off or counterclaim against the respondent exceeding the sum of \$20,694.02 failed in that it was not one which is enforceable by her in her own right against the respondent and which further was indeterminate and uncertain."

With that reasoning of the learned judge we entirely agreed, and accordingly dismissed the appeal.

Appeal dismissed.

Solicitors: *Sharma & Co.; Lim, Lim & Oon.*

YONG MAY INN v. SIA KUAN SENG

[O.C.J. (Sharma J.) March 1, 1971]

[Malacca — Originating Summons No. 89 of 1970]

Infants — Guardianship — Application by mother for custody of children — Welfare of infants, — Whether High Court can make order in guardianship proceedings for maintenance of infants — Married Women and Children (Maintenance) Ordinance, 1950 — Guardianship of Infants Act, 1961, s. 5.

A The applicant, the mother of the infants, claimed the custody and care of three daughters born to her through her marriage with the respondent. There were disputes between the parties and the applicant and the children left the respondent. The girls were aged 12 years, 10 years and 8 years respectively.

Held: (1) taking everything into consideration, and above all the welfare of the children, it was best for them to remain in the guardianship of their own mother, the applicant;

B (2) the court has jurisdiction to make an order for maintenance of the infants and in this case the respondent will be ordered to pay to the applicant a sum of \$60 a month for the maintenance of the three children.

Cases referred to:-

(1) *In re McGrath* [1893] 1 Ch. 143 at p. 148.

(2) *Queen v. Gyngall* [1893] 2 Q.B. 232 at p. 248.

(3) *Wellesley v. Duke of Beaufort* 38 E.R. 236.

ORIGINATING SUMMONS.

S. C. Navarednum for the applicant.

Ting Poi Teck for the respondent.

Cur. Adv. Vult.

D **Sharma J.:** The applicant in these proceedings claims the custody and care of the three daughters born to her through her marriage with the respondent. The three children are: —

(1) Sia Yet Wah (f) — born in September 1958

(2) Sia Guek Yin (f) — born in November 1960

E (3) Sia Yek Yen (f) — born in June 1962

The applicant in fact gave birth to another girl in April 1967 but that child has already been given in adoption and is not the subject matter of these proceedings.

F The respondent is a goldsmith and is, according to his own evidence, now earning about \$150 per month. He was, at the time of his marriage to the applicant in 1957, employed as an assistant in a goldsmith's shop at Merlimau. Now he runs his own business at Malacca. He lives in a house at Bachang and the three children live with him there. He leaves his house at 8.00 a.m. and returns home at 6.00 p.m. but on two nights every week he sleeps in his shop at Malacca. All the three children leave the house at about 7.30 in the morning to attend school. He can thus be with the children for about three to four hours a day in the evenings. The respondent has a mother aged about 58. She lives in the same house and shares the bedroom occupied by the children. There are two more rooms in the respondent's house. One room is occupied by the respondent's younger brother and the other by his younger sister both of whom are married.

G It appears from the affidavit of the applicant that much of the trouble between the parties is attributable to the presence of the applicant's mother-in-law in the house and her disappointment at the failure of the applicant to present her with grandsons instead of granddaughters. It is unfortunate that this trouble should have spoilt the family life of the couple and have generated an atmosphere which could be far from conducive to the welfare of the family and the children. Whatever be the real cause of such disputes, discords and splits between the applicant and the respondent is not a matter into which I should go in these proceedings, although there are a number of allegations